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Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF, INCLUDING HISTORICAL NOTES ON AMERICAN MERCHANT SHIPPING

JACOB RASSNER,
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SUPPLEMENTAL BRIEF, INCLUDING HISTORICAL NOTES ON AMERICAN MERCHANT SHIPPING

We gratefully avail ourselves of the privilege granted by this Honorable Court to submit a supplemental brief, including some historical notes concerning United States merchant shipping.

The Constitutional power of Congress to permit the Government to engage in the shipping business is discussed by Judge Clark in the case of *United States* v. *Mayor and Council of City of Hoboken, N. J.*, 29 F. 2d 932, at page 946 in the following language:

> "It is to be noted that the original shipping acts, 46 USCA § 801, and the two Merchant Marine Acts of 1920 and 1928, 46 USCA § 861, and Pamphlet Supplement USCA § 891, all contain references to the national defense or to the use of ships as naval or military auxiliary or both. These references may indicate the Congress' own view that the powers assumed are implied in their 'war powers,' or, perhaps, as part of the powers appertaining to sovereignty rather than obtained from the commerce clause. It may also be argued that the shipping, or,

for that matter, [illegible] business, comes within the meaning of the general welfare clause of the Constitution. Article I, [illegible], cl. 1."

Petitioners pray for equality of Congressionally grantetd rights for tort, death and personal injury damages, suffered in the service of the American merchant marine on Government operated vessels, the same as on privately operated vessels, exclusively under maritime law.

Compensation law grants complete immunity from liability in certain tort cases and substantial limitation of damages in all others, thus, giving tremendous advantage to a shipowner as to the measure of damages under compensation law, than liability under maritime law.

It is common knowledge that all maritime unions and American merchant seamen in general, have consistently opposed Congressional enactment of compensation law, insofar as they are concerned by reason of such law being confiscatory of rights granted seamen by Congress.

Corporations, the stock of which is owned by the United States, are distinct entities from the United States, as other corporations are distinct entities from their stockholders, and employees of such corporations are not employees of the United States.

Strang v. *U. S.*, 254 U. S. 491;
Sloan Shipyards Corpn. v. *U. S. Shipping Board Emergency Fleet Corpn.* (1922) 258 U. S. 549;
Skinner and Eddy Corpn. v. *McCarl* (1927) 275 U. S. 1, 6, 7 citing;
34 Opinions of the Attorney General, 241 (1924);
Whan v. *U. S.* (C. A. D. C. 1949) 180 F. 2d 38, 41;
34 Opinions of the Attorney General 120 (1923);
34 Opinions of the Attorney General 363 (1925).

To quote from Mr. Justice Frankfurter in the case of *Bisso* v. *Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629, at page 118:

> "Certainly we cannot assume that the Government is exploiting the maritime services it is rendering in an unreasonable or coercive manner."

The Government when in case of war or other emergency, is compelled to operate its vessels, it does so through a general agent or other subsidiary Government owned corporation or company.

The tremendous excess of labor over available employment on ships in time of peace destroys the equality of bargaining between the parties.[1]

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[1] After war broke out in Korea, ships were withdrawn from the Government reserve fleet and by March, 1952, over 500 such vessels were in operation.

Today the total U. S. merchant fleet (active and inactive) of oceangoing vessels of 1,000 gross tons and over, numbers about 3,000 ships of over 30,000,000 deadweight tons.

According to Bulletin No. 1238 of the United States Department of Labor, November, 1958, the American Merchant Marine consists of 2,984 vessels of 32,398,000 deadweight tons as of June 30, 1957. About one-third is privately owned. The United States Government owned 1,968 vessels, totalling 19,366,000 deadweight tons. However, of said number, most are laid up in the reserve fleet.

The United States has in active service 161 ships.

The average complement of each merchant vessel is 47.

Master

1 Second Mate	6 Able-Bodied Seamen
1 Third Mate	3 Ordinary Seamen
1 Fourth Mate	1 Chief Engineer
1 Radio Officer	1 First Assistant Engineer
1 Purser/Pharmacist	1 Second Assistant Engineer
1 Bosun	1 Third Assistant Engineer
2 Deck Maintenance *	2 Junior Third Assistant Engineers

* Operating requirements may prescribe additions of a carpenter or deck maintenance.

[Continued on page 4]

In the *Bisso* case, *supra*, the Court, both in the prevailing and dissenting opinions, are in agreement that the prevailing policy of the United States is to reject judicial

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[Continued from page 3]

1 Electrician
1 Second Electrician
1 Engine Maintenance
3 Oilers
3 Firemen, Water Tenders
3 Wipers
1 Chief Steward
1 Chief Cook
1 Cook and Baker
1 Assistant Cook
6 Messmen/utility men

The average time of industry connected seamen is 243 days.

"*Annual Employment*

"During the year studied, industry connected seamen averaged 243 days of employment (table B-1). This average, however, conceals wide variations in the number of days worked by industry connected seamen. Thus, over 8 percent worked less than 120 days and over 30 percent worked less than 210 days. On the other hand, 27 percent worked more than 300 days during the year. This study verified the common belief that licensed officers more frequently stay with the same employer and have fewer periods of unemployment than do unlicensed personnel. They might, therefore, be expected to average many more days of employment than unlicensed seamen. During the period of study, however, this difference was surprisingly small.

The fact should be kept in mind that the year of employment studied was one of the peak peacetime years for shipping and that many seamen were able to secure all the work they wanted during the year. The average licensed officer, in fact, was employed for as many or more days as the fully employed shoreside worker on a 5-day week. If earned vacation time, which is not included in the employment on earnings estimates in the study, is added to the average employment of unlicensed seamen, they also would have had, on the average, total employment almost equal to a fully employed 5-day week shoreside worker. The average unlicensed seaman would have earned 9 days' vacation at base pay for his 239 days of employment." Bulletin No. 1238, United States Department of Labor, pages 26, 27.

The estimate number of available seamen is 100,000 with jobs but for only 60,000 (p. 7).

[Continued on page 5]

sanction to any agreement induced under conditions where there is inequality of bargaining power between the parties to the contract.

In the cases at bar, the seamen were not in fact employees of the United States Government, but of separate and distinct agencies.

[Continued from page 4]

June	Number of active American flag vessels	Total complement
1950	1,145	57,250
1951	1,414	70,700
1952	1,386	69,300
1953	1,358	67,900
1954	1,123	56,150
1955	1,101	57,510
1956	1,091	57,190
1957	1,153	60,730
1958	937	51,430
Average	1,190	60,910

(Page 26)

It is the custom of the trade that seamen get their employment through a particular union.

International Organization of Masters, Mates and Pilots (MMP);
National Marine Engineers' Beneficial Association (MEBA);
American Radio Association (ARA);
Radio Officers Union of the Commercial Telegraphers Union (ROU);
American Merchant Marine Staff Officers Association (AMMSOA);
Staff Officers Association of America (SOA);
National Maritime Union of America (NMU);
Seafarers' International Union of North America (SIU);
Sailors' Union of the Pacific (SUP) (p. 88).

When "employment" is a pure fiction, the Supreme Court of the United States has stated in the *Bisso* case, *supra*, that it will look at the true facts and disregard the fiction.

The power of this Court to correct inequity in admiralty matters is stated by Mr. Justice Frankfurter in the dissenting opinion in the *Bisso* case, *supra*, in the following language at page 98:

> "Drawing on its constitutional powers in matters maritime, Art. III, sec. 2, this Court has probably made as much substantive admiralty law through adjudication as has Congress by legislation."

and further stated at page 116:

> "This Court has not, to be sure, in every instance awaited congressional action before imposing views of public policy upon contracting parties."

There is no conflict of opinion but that a seaman has but one exclusive remedy for a personal injury or death claim.

It is in the nature of the remedy wherein the difference of opinion lies.

It is axiomatic that whether the remedy comes within the category of a compensation claim or is one in the nature of a maritime claim against the United States Government depends on Congressional intent.

The Government's position is that the *Federal Employees' Compensation Act*, 5 U. S. C., sec. 751, *et seq.* (1916) provides the exclusive remedy.

It is petitioners' contention that Congress did not and factually could not have considered the rights of seamen employed on Government operated vessels at that time, as there weren't any such vessels in existence then.

The *Compensation Act*, *supra*, is completely silent as to its applicability to merchant seamen, consequently, in and

of itself, it has no probative value in determining Congressional intent with relation to seamen's rights.

Our thoughts could perhaps be better expressed by quoting from Henry Carter Adams [2]:

> "* * * much of the confusion that now surrounds the question of the appropriate duties of government, so far as the people in this country are concerned, is due to the failure to distinguish between laissez-faire as a dogma and free competition as a principle."
>
> "* * * in speaking of the claims of laissez-faire, we are dealing with a rule laid down for the control of all matters of government, and have to do with 'permanent and universal principles of human nature,' only so far as we undertake to explain the basis upon which it is conceived to rest."

Justice requires that in determining the rights of seamen, all related acts should be considered in *pari materia,* as this Court has consistently ruled,[3] more fully pointed out in petitioner's main brief.

Insofar as we are concerned with the intent of Congress, it appears to be of the utmost importance to understand the reasons which impelled Congress to act. For the answer, we look to the history of the United States Merchant Marine and the purposes of the seamen Acts as expressed by Congress.

The main issue is whether seamen employed on merchant vessels operated by the United States Government in public service are excluded or included within the provisions of the Federal Compensation Act of September 7, 1916, *supra,* in the main brief.

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[2] Relation of the State to Industrial Action and Economics and Jurisprudence, Columbia University Press, 1954.

[3] *American Stevedores, Inc.* v. *Porello,* 328 U. S. 827, 153 F. 2d 605, 330 U. S. 446, 91 L. Ed. 1011;

Canadian Aviator, Ltd. v. *United States,* 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

It is no more than fitting and proper that in determining Congressional intent that the purposes of the Act be considered.

The language of the Compensation Act, *supra*, is silent as to whether or not said Act includes seamen in the employ of the United States Government.

The purpose and scope of the Act is clearly set forth in footnote 1 of § 751 of U. S. C. 5 in the following language:

> " * * * to give compensation to its employees, who otherwise would be without remedy when injured by the fault of the government, * * * ".

Congress having provided a remedy for seamen employed on United States vessels by various Seamen's Acts, as set forth in the main brief, are not without remedy and therefore do not come within the purposes or scope of the Compensation Act.

The purposes and scope of the Act was to exclude seamen, and this fact is further demonstrated by the Act of October 14, 1949, 5 U. S. C. § 7914(b) and 50 U. S. C. Sec. 1291, which provides as follows: (This section was incorrectly cited in the main brief at pg. 19 as sec. 575 instead of sec. 791).

> "(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868."

The same Congressional intent is further demonstrated by the Clarification Act of 1943 in the following language:

> " * * * Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; * * * ". (Govt's brief, p. 36)

No distinction is justified by the fact that seamen are employed by, rather than on behalf of, the War Shipping Administration. *Bisso, supra.*

This view seems to be practically conceded by the following which appears at the foot of page 27 of the brief for the United States:

> "* * * This understanding was emphasized in the letter of the Chairman of the Compensation Commission commenting on the Clarification bill. It stated: 'House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (September 2, 1942), p. 6; H. Rept. No. 107, 78th Cong., 1st Sess., p. 34.'
>
> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of the War Shipping Administration, * * *".

The technical distinction of employment by or on behalf of the War Shipping Administration should not be given restrictive meaning, but interpreted as all remedial legislation in a liberal view. *American Stevedores, Inc.* v. *Porello, supra; Canadian Aviator, Ltd.* v. *United States, supra.*

The Court in the case of *Sevin* v. *Inland Waterways Corporation*, 88 F. 2d 988, expressed its rejection of restrictive meaning in the following language at page 989:

> "The act does not confine itself to vessels of corporations in which the United States *then* owned the entire stock, but uses the future tense 'shall own,' and the Inland Waterways Corporation falls clearly within the words. The act controls such suits against this corporation as are within its terms."

Congress, at all times without exception, made no distinction between the status of merchant seamen on one merchant vessel as against another on the basis of ownership, or operation of the particular ship, or the voyage in

question. A concession that this is so appears in the brief for the United States where in the middle of page 27 the following is stated, as the opinion of the General Counsel of the War Shipping Administration, as expressed to the House Merchant Marine and Fisheries Committee on September 2, 1942:

> "* * * Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters."

Judge Learned Hand in the case of *Bygonnes, etc.* v. *United States, D. C.*, 298 F. 123, pointed out that it is the nature of the work in which the vessel is employed which is to be considered and not the question of ownership.

All of the vessels in question in the case at bar were merchant vessels, and consequently, all of the seamen working thereon are entitled to be treated uniformly, the same as seamen in private employment, regardless of what use the vessels happen to be put to for a particular voyage.

In the case of *The Beaton Park*, 65 F. Supp. 211, the Court stated at page 212:

> "(1, 2) In this country our theory as to government in business is that when our Government enters upon an ordinary commercial business undertaking, such as operating merchant ships, it does so under the same liabilities and responsibilities as private individuals when they engage in the same kind of business; and Congress has given consent for the institution of legal actions by those aggrieved for the enforcement of such liabilities of the Government. In respect to merchant ship operations, we do not recognize the Government as having immunity from suit."

It is respectfully submitted that when the Government carries cargo or passengers, it does not perform a single act, more nor less, than a private shipowner.

The carrying of freight or passengers constitutes competition with commercial shippers. The fact that the Government does not make a charge for such service in nowise diminishes the fact that the commercial shipper is deprived of the opportunity of carrying the merchandise which he otherwise would do.

This interferes with private shipping and is contrary to the entire history of Congressional enactment relative to the American merchant marine and all the shipping Acts, without exception.

Our courts, particularly the Supreme Court of the United States, have consistently held that where the Government enters into the activities of a private business, it should be treated, insofar as practicable, as a private person or corporation.

The Supreme Court of the United States in the case of *Federal Housing Administration, Region No. 4 v. Burr*, 309 U. S. 242, 60 S. Ct. 488, stated at page 245 (U. S. Report):

> "(3, 4) As indicated in Keifer & Keifer v. Reconstruction Finance Corporation, supra, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. Keifer & Keifer v. Reconstruction Finance Corporation, supra. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued', it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or con-

> stitutional scheme,[3] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

In the case of *Pennell* v. *Home Owners' Loan Corporation*, 21 F. Supp. 497, the Court stated at page 499:

> "(8) 'When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation.' Sales v. U. S., 2 Cir., 234 F. 842, 844."

In the case of *Prato* v. *Home Owners' Loan Corporation*, 106 F. 2d 128, the Court stated at page 129:

> "(1) 'The government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' United States v. Lee, 106 U. S. 196, 213, 221, 1 S. Ct. 240, 254, 261, 27 L. Ed. 171; Sloan Shipyards Corp. v. U. S. Fleet Corp., 258 U. S. 549, 567, 42 S. Ct. 386, 388, 66 L. Ed. 762. * * * "

Judge Denman clearly expresses the fair, just and correct intent of Congress when he states in the case of *United States* v. *Logola*, 161 F. 2d 126, at page 127 as follows:

> "(2) Under the Suits in Admiralty Act of 1920, 46 U. S. C. A., sec. 741 et seq., we have held that 'the United States in the operation of its merchant vessels' is liable for the relief of a seaman for his maintenance and cure. McInnis v. United States, 9 Cir., 152 F. 2d 387. In reaching the conclusion that the sovereign has here yielded its immunity for suit, we follow the decision of the Canadian Aviator case, 324

> U. S. 215, 65 S. Ct. 643, that the broad language of the Public Vessels Act 'was deliberate and is not to be thwarted by an unduly restrictive interpretation.' Our interpretation is also supported by the long established rule that legislation affecting a seaman's injuries and maintenance and cure is to be construed liberally in the seaman's favor. Jamison v. Encarnacion, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082; Aguilar v. Standard Oil Co., 318 U. S. 724, 729, 63 S. Ct. 930, 87 L. Ed. 1107; Cortes v. Baltimore Insular Line, 287 U. S. 367, 375, 53 S. Ct. 173, 87 L. Ed. 368."

Judge James Alger Fee expressed the same view in the case of *Portland Trust & Savings Bank v. United States*, 24 F. Supp. 953, in the following language at pages 954 and 955:

> "While the statute of consent is to be strictly construed in favor of the United States, precaution should be used not to violate an obvious purpose of the Congress by a too rigid application of that canon of construction."

The decision in the case of *Cohen v. United States*, 195 F. 2d 1019, Judge Chase speaking for the Court consisting of Judges Augustus N. Hand, Chase and Frank, stated at page 1021:

> "(1-3) While it is well settled that statutes permitting the government to be sued are to be construed strictly, McMahon v. United States, 342 U. S. 25, 72 S. Ct. 17, the overriding consideration is that the intent of Congress, where that can be determined, must be given effect. Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784; Guiseppi v. Walling, 2 Cir., 144 F. 2d 608, 624, 155 A. L. R. 761, affirmed 324 U. S. 244, 65 S. Ct. 605, 89 L. Ed. 912; Johnson v. United States, 1 Cir., 163 F. 30, 18 L. R. A., N. S., 1194."

The vessels involved are concededly all merchant vessels. Neither petitioner nor the Government are urging a

distinction as to whether or not merchant vessels are utilized in public or private service.

Congress set up various agencies for operation of its merchant fleet, but only for a limited time, to meet existing emergency. One of such agencies was the Inland Waterways Corporation, which is discussed as follows in the case of *Goltra* v. *Inland Waterways Corporation*, 49 F. 2d 497, wherein the Court stated at page 498:

> "The defendant, the Inland Waterways Corporation, was created by Act of Congress of June 3, 1924 (49 USCA Secs. 151-156), for the purpose of carrying on the operations of the government-owned inland canal and coastwise waterways system to the point where the system might be transferred to private operation to the best advantage of the government. The Secretary of War was deemed to be the incorporator, and was authorized to govern and direct the corporation in the exercise of the functions vested in it by law. The corporation was to continue the operation of the transportation and terminal facilities then operated by the Secretary of War. Section 6 of the Act (49 USCA Sec. 156 (a.b.d.) provides in part as follows:
>
> "(a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended. * * *
>
> "(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation."

Congress has never made any statement or passed any Act wherein it is stated that a seaman employed in the

service of the United States Government in its merchant fleet is relegated to compensation in the event of personal injury or death.

The Government's brief, urging that technical distinctions be made between *seamen* and *seamen* on the basis of the circumstances under which he is hired, rather than the nature of his employment, does violence to the American concept of uniformity of Admiralty law.

> *The Osceola*, 1903, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760;
> *The Iroquois*, 1904, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955;
> *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107.

Congress has consistently given directives in each and every instance wherein it legislated concerning the United States Government operated merchant marine, that employment and customary commercial practice in the maritime industry be applied in the operation of its merchant fleet.

It is not our intention to criticize the decisions in *Johansen* v. *United States*, 343 U. S. 427, 72 S. Ct. 849 and *Mandel* v. *United States*, 343 U. S. 427, 72 S. Ct. 849, but to point out that the effects thereof have caused results contrary to Congressional intent.

In justification for what might otherwise seem too presumptuous, which we assure the Court is furthest from our mind, we refer to an excerpt from the Bar Bulletin, Volume 16, pages 206 and 207, which reported the address of Mr. Justice John M. Harlan, as follows:

> "Welcome Criticism
>
> Sixty years ago when the Court also sat in a controversial climate, Mr. Justice Brewer had this to say:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

"For my part the truth of this statement is not debatable. The Supreme Court, no less than the top echelons of the other two great branches of the Federal Government, should never be immune from criticism. Indeed the Court itself, perhaps more often than not, has divided on the great issues coming before it, and should the Court in the doing of its work ever be led to sacrifice the oathbound views of its individual members to the more comfortable business of unanimous decision it would soon cease to be worth its salt. Dispassioned criticism of the Court's decisions is something to be welcomed, and if in order to preserve that healthy state of affairs the Court must also suffer unjust attacks it is a price that must be paid."

The urgency and imperative need of uniform admiralty rules comes within direct focus at a time when our Merchant Marine, as Senator Magnuson said on April 21, 1959, as reported in the Congressional Record of April 21, 1959, at page 5771, is facing acute problems.

"THE AMERICAN MERCHANT MARINE

MR. MAGNUSON. Mr. President, the American Merchant Marine, in company with the shipping of all the world, is having its troubles. Foreign trade is down, and cargoes are scarce. World tonnage is far in excess of current needs. As a result, freight rates are down, to the point where U. S. flag vessels find it difficult, if not actually impossible, to be competitive.

> To cap it all, certain shipping conference agreements, under which our shipping has been able to work cooperatively with their foreign competitors, have been questioned by the Supreme Court. The problems thus created must be resolved before temporary 'status quo' legislation enacted last year expires on June 30, 1960.
>
> It is a matter of urgent importance to the great maritime industry of our country, one that merits the most thorough attention of all Members of this body."

We respectfully submit that under all of the circumstances, the present situation calls for the exercise of its constitutional powers in matters maritime, Article 3, Section 2, in accordance with the expression of Mr. Justice Frankfurter, as heretofore stated in the *Bisso* case, *supra*, to the end that we may enjoy uniformity of decision and equality of remedies in matters maritime.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioners.

APPENDIX

Historical Background

Prior to the Revolutionary War, the American Colonists did build and sail merchant ships and did trade over all the oceans and with all of the ports of the world. With the invention of new types of ships, the schooner and clipper, which were superior to all other vessels, at the end of the eighteenth century, American ships carried almost all of this country's growing trade.

On August 18, 1787, when the Federal Convention was in session, the members of the Convention adopted the issues of James Madison, that the proper power for the general government would be not to "build and equip fleets" but "to provide and maintain a navy."[4]

Reports of registered tonnage was first made in 1793, and according to Alexander Hamilton, Secretary of Treasury, our tonnage employed in foreign commerce was 289,394.

According to H. C. Calvin and E. G. Stuart,[5] on December 31, 1789, we had 123,893 tons of shipping under the American flag, and by 1800 the tonnage had increased to 667,107.

In 1800, the United States had its first Navy.

The United States was successful with its experiments of steamboats like Robert Fulton's Clermont, which demonstrated the reliability of steampower in 1807. Twelve years later, the S.S. Savannah successfully crossed the Atlantic under steam power.

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[4] United States Formation of the Union--Documents—Library of Congress—page 568.

[5] The Merchant Shipping Industry, H. C. Calvin & E. G. Stuart, John Wiley & Sons, Inc., 1925.

With the coming of steam, America lost her lead among maritime nations for she lacked the abundant coal close to the sea and the skilled iron workers which Great Britain had.

After March 3, 1815, we removed the discriminating duties in favor of American ships, following which during the years 1816 to 1829, the principal maritime countries of the world accepted partial reciprocity with reference to the shipping of this country.

In 1898, when American ships were carrying less than 10% of United States trade, and it was necessary for the Army and Navy to purchase 136,700 tons of foreign merchant shipping, our Government first attempted to help merchant shipping by granting contracts to carry mail or by permitting the import of shipbuilding materials without tariff.[6]

By 1901, American ships carried but 8% of our foreign trade. In 1913, The House Committee on the Merchant Marine and Fisheries conducted an investigation as to need of control over ocean transportation. On the basis of the report of said Committee, Congress established a shipping board having regulatory and quasi judicial functions over shipping.

After August 15, 1914, American citizens were permitted to buy foreign built vessels and transfer them to American registry and we did buy over three-quarters of a million of the finest vessels.

When the first World War broke out in Europe, ships of the warring nations were suddenly withdrawn from our service and a great shipbuilding program was begun. It is then that we find the United States Government establishing an agency for United States Shipping.

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[6] United States Department of Commerce Publication of November, 1958, entitled the U. S. Merchant Marine, A Brief History.

The United States Shipping Board Emergency Fleet Corporation was established pursuant to the provisions of the Shipping Act of September 7, 1916, which Act was the foundation for putting the United States into merchant shipping.

From 1917 until the time of the armistice, the Shipping Board worked through the Emergency Fleet Corporation.

The Emergency Fleet Corporation was created with a limitation of existence for five years after secession of hostilities.

The United States first entered the shipping business under the authority of the Shipping Act of 1916, c. 451, § 1, 39 Stat. 728, 46 U. S. C. § 801-814, *et seq.* This Act provided for the creation of a Shipping Board, and in substance, for the Government to go into the business of operating merchant vessels.

The Emergency Fleet Corporation was organized by the Board on April 16, 1917 and granted powers equivalent to that of private shipping companies. Its functions were limited to the mercantile trade.

See: *Whan* v. *Green*, 22 F. 2d 483.

It built a total of 2,318 vessels from 1918 to 1922. However, after the close of the war there was "A slump in shipping during the world-wide depression in the 1930's brought the United States merchant fleet again to a dangerously low level. In 1936 our merchant marine was fourth among the six leading maritime nations in tonnage, sixth in vessels 10 years of age or less, fifth in vessels with speeds of 12 knots or over."

The Urgent Deficiencies Act of 1917 (p. 485) further facilitated the operation of merchant vessels and authorized the President to requisition ships to such agencies as he should select.

On June 5, 1920, the United States Shipping Board was formed and its duties enumerated. c. 250, § 3, 41 Stat. 989.

The functions of the operating agencies of Government owned merchant vessels as well as agencies were changed from time to time.

The purpose and policy of the United States in maintaining and operating a merchant fleet is set forth in the Merchant Marine Act of 1920, 46 U. S. C. § 861.

The Inland Waterways Corporation was created by Congress in 1924 for the purpose, among others, "of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government * * *". 43 Stat. 360, 49 U. S. C. 151. Its functions and obligations were transferred to the Department of Commerce by 1939 Reorganization Plan No. II, sec. 6 (53 Stat. 1434, 4 F. R. 2732). The vessels of the Inland Waterways Corporation were sold in 1953.

Chapter 27 of the Merchant Marine Act of 1936, § 1101 declares the policy of the United States being to foster the development and encourage the maintenance of a merchant marine. Title 46 U. S. C., sec. 1101. Thereafter pursuant to the Act of June 29, 1936 ch. 858 §§ 201, 204, 49 Stat. 1987, U. S. C. 46, §§ 1111 and 1114 of the United States Maritime Commission was created and the function of the former United States Shipping Board, including those vested in the Department of Commerce by Ex. Ord. No. 6166, referred to above, transferred thereto.

At all times we find the clear expression of Congress that it intended that merchant vessels be " * * * owned and operated insofar as practical by citizens of the United States * * *."

The Merchant Marine Act, 1936, set up a United States Maritime Commission consisting of five members. The

Commission made a survey of the state of the merchant marine and laid out a long-range program of shipbuilding designed to provide 500 new ships in the next 10 years. A new basic type of cargo ship was designed, the "C" type ship, and a fine new passenger liner, the S. S. AMERICA was built.

On June 29, 1936 the U. S. Shipping Board Emergency Fleet Corporation was dissolved.

Chap. 858-Title 2, § 203, 49 Stat. 1987 (p. 294 in the footnote).

The War Shipping Administration came into existence by the President's order on February 7, 1942. Section 202 of the Act of July 8, 1946, 60 Stat. 501, terminated the War Shipping Administration as of September 1, 1946, and transferred its functions to the United States Maritime Commission for the period from September 1, 1946 to December 31, 1946, for the purpose of liquidating the Administration. Upon the abolition of the United States Maritime Commission (1950 Reorg. Plan No. 21, 15 F. R. 3178, 64 Stat. 1273), the remaining functions were transferred to the Department of Commerce, Maritime Administration.

From 1942 through 1945 the United States shipyards built 5,592 merchant ships, of which 2,701 were Liberty ships, 414 were the faster Victory type, 651 were tankers, 417 were standard cargo ships, and the remaining 1,409 were military or minor types.

The Government also took over the direction of ship operation. In February 1942 the War Shipping Administration was established for this purpose. The head of the Maritime Commission was also head of this new agency, and the two departments worked closely together.

The Army and Navy took many merchant ships as auxiliaries, for use as hospital ships, repair ships, airplane carriers, and for other special uses.

In 1942, the United States Merchant Fleet consisted of 1375 ocean-going vessels, employing some 55,000 men.

After World War II, the Government sought to restore the merchant fleet to private control as quickly as possible. By the end of 1947 all the vessels taken over from private operators had been returned to their owners.

When the sales authority under the Merchant Ship Sales Act expired on January 15, 1951, 1,956 ships had been sold, 843 to American and 1,113 to foreign flag operators, at a return of nearly two billion dollars to the Government. Surplus vessels were laid up in reserve fleets at eight sites throughout the country, where they were carefully preserved for emergency use.

For some time after the war there were not enough privately owned ships to carry all the relief supplies needed. Operators therefore chartered government ships in large numbers to supplement their own services. By mid-1947 there were 1,500 government-owned ships under charter. As economic conditions abroad improved and merchant fleets were stored, the government-owned ships were returned to the reserve fleets. By mid-1950 the number under charter had dropped to less than 100.

The War Shipping Administration was dissolved on September 1, 1946, and its remaining functions were returned to the Maritime Commission.

Since the Commission did not prove sufficiently flexible for this dual job, it was abolished by the President's Reorganization Plan 21 of 1950. In its place the President established two new agencies, the Federal Maritime Board, and the Maritime Administration, which he placed under the jurisdiction of the U. S. Department of Commerce.

The functions of the mechanical division of the Panama Canal were taken over by the Panama Canal Company, a wholly owned instrumentality of the United States.

In the case of *Panama Canal Company* v. *Grace Line*, 78 S. Ct. 752, 356 U. S. 311, the Panama Canal Company is explained in the following language at page 753:

> "Petitioner was created by Congress in 1950. 64 Stat. 1041. It holds the assets of the Panama Canal and has the duty of operating and maintaining it. It may sue and be sued in its corporate name. Canal Zone Code, Tit. 2, sec. 248, 62 Stat. 1078, as amended, 64 Stat. 1038. Prior to 1950 the Panama Canal was operated by the President through the Governor of the Canal Zone. 37 Stat. 561. Business activities incident to that operation were conducted by the Panama Railroad Co., a federal corporation, 62 Stat. 1076, which was an agency and instrumentality of the United States, *ibid.* Those auxiliary business activities were "designed and used to aid" in the management and operation of the Canal. See People of State of New York ex rel. Rogers v. Graves, 299 U. S. 401, 406, 57 S. Ct. 269, 271, 81 L. Ed. 306. Since 1950 all those business activities have been carried on by petitioner, the Panama Canal Co., all of whose stock is held by the President or his designee, Canal Zone Code, Tit. 2, sec. 246(a), the present designee being the Secretary of the Army."

1944—Approximately 2,500 liberty ships
400 C types
500 tankers
100 Victory ships

3,500

1945—November 1st—4,442 ships and 240,000 officers and men

1945—End of World War II—4,286 ships and 250,000 officers and men

After war broke out in Korea, ships were withdrawn from the Government reserve fleet and by March, 1952, over 500 such vessels were in operation.

Today the total U. S. merchant fleet (active and inactive) of ocean-going vessels of 1,000 gross tons and over, numbers about 3,000 ships of over 30,000,000 deadweight tons.

According to Bulletin No. 1238 of the United States Department of Labor, November, 1958, the American Merchant Marine consists of 2,984 vessels of 32,398,000 deadweight tons as of June 30, 1957. About one third is privately owned. The United States Government owned 1,968 vessels, totalling 19,366,000 deadweight tons. However, of said number, most are laid up in the reserve fleet.

The United States has in active service 161 ships.

The average complement of each merchant vessel is 47.

All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6, eff. Aug. 19, 1949, 14 F.R. 5228, 63 Stat. 1069. See note set out under section 111 of this title.

On the authority of the 1950 Re-organization Plan #21 the "Federal Maritime Board" was substituted for "Maritime Commission".

1956—3,179 ships

1957—3,075 ships—1,102 active and 1,973 temporarily inactive.

1958—Government owned 2,123 ships

The United States Coast Guard, through the Merchant Marine counsel, is now holding public hearings which commenced Monday, April 27, 1959, for the purpose of receiving helpful suggestions for the betterment of American Merchant Marine, and it seems to us that nothing would be more valuable than assistance from the Supreme Court of the United States in fostering equality of maritime rights and uniformity of admiralty law.